Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 21, 1995

Ms. Tamara A. Armstrong
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR95-1560

Dear Ms. Armstrong:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 28278.

Travis County (the "county") received a request for information "including, but not limited to, statements, photographs, reports and other materials" relating to the investigation of a shooting incident in which a man was killed. An individual has been convicted in connection with that shooting. You state that the information at issue is excepted from disclosure under sections 552.101, 552.103, 552.111, and 552.114 of the Government Code.

You contend that all of the information in Exhibits A through F is excepted from disclosure pursuant to section 552.103(a) of the Government Code, which states:

> (a) Information is excepted [from disclosure] . . . if it is information:
>
> (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party . . . and;

> (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.
>
> (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

To show the applicability of section 552.103, a governmental entity must show that litigation is reasonably anticipated or pending and that the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Generally, the applicability of section 552.103 ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. However, you state that even though the defendant has been convicted he has not exhausted all of his appellate and postconviction remedies. Section 552.103 is applicable until those remedies have been exhausted.

We have reviewed the information at issue and conclude it is related to the litigation. However, once information has been obtained by all parties to the litigation through discovery or by other methods, no section 552.103 interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. Most of the information in the exhibits, such as statements from witnesses, lists of facts about the offense, and pictures, have likely already been disclosed to the defendant and his attorney. The defendant's own statement, letters, and other similar information are also included in these exhibits. You may not withhold records that have already been seen by the defendant or his attorney unless the records are otherwise confidential by law. We will consider your other arguments for withholding information from disclosure.

You have submitted to this office as "Exhibit A" a jury panel list, questionnaires completed by prospective jurors, and what appears to be criminal history record information ("CHRI") on certain prospective jurors. You contend that information on the questionnaires is excepted from disclosure under the common-law and constitutional privacy provisions of section 552.101 and under federal law. Article 35.29 of the Code of Criminal Procedure provides for the confidentiality of information concerning those who serve or have served as jurors:

> Information collected by the court or by a prosecuting attorney during the jury selection *process about a person who serves as a juror*, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court,

> the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court *in which the person is serving or did serve as a juror.* On a showing of good cause, the court shall permit disclosure of the information sought. (Emphasis added).

Access to that information is governed by the provisions of this statute rather than chapter 552 of the Government Code. Therefore, information about those who served as jurors is confidential pursuant to article 35.29.

Concerning information at issue to which article 35.29 is inapplicable, we will consider your other arguments as to why the information should be excepted. You rely upon Open Records Decision No. 622 (1994) for your argument that the social security numbers of prospective jurors are excepted from disclosure pursuant to 42 U.S.C.A section 42 U.S.C. § 405(c)(2)(C)(viii)(I). In Open Records Decision No. 622 (1994) at 4, this office stated that social security numbers obtained or maintained by a governmental entity "pursuant to any provision of law, enacted on or after October 1, 1990" are made confidential by federal law. The prospective jurors' social security numbers are confidential if they were collected or maintained pursuant to a law that was enacted on or after October 1, 1990.[1]

You also contend that information in the questionnaires is protected from disclosure under the section 552.101 protection for common-law and constitutional rights to privacy. The Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) set out the test for determining if information is excepted from disclosure under the common-law right of privacy. Information is confidential under the common-law right to privacy if it (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonably person and (2) is of no legitimate concern to the public. You have marked information detailing an injury on one jury questionnaire that you contend is confidential under common-law privacy. We agree that the marked information is confidential under common-law privacy and may not be released.

Information is confidential under the federal constitution if it is information regarding the person's right to make certain decisions about matters that the United States Supreme Court has stated are within the "zones of privacy" described in *Roe v. Wade*, 410 U.S. 113 (1973) and *Paul v. Davis*, 424 U.S. 693 (1976). The "zones of privacy"

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[1]You state that the social security numbers were collected in 1993. We note that the fact that social security numbers were collected after October 1, 1990 is not determinative of whether they are confidential.

include matters related to marriage, procreation, contraception, family relations, and child-rearing and education. *Paul*, 424 U.S. at 713. Constitutional privacy also encompasses the freedom from being required to disclose certain personal matters to the government. *Ramie v. City of Hedwig Village*, 765 F.2d 490, 495 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986). Such matters would be those "involving the most intimate aspects of human affairs." *Id.* at 494; *see also* Open Records Decision No. 455 (1987) at 5.

You contend that some of the information you have marked in the questionnaires is protected from disclosure by the right of constitutional privacy. It does not appear that any of the other information is excepted from disclosure under constitutional privacy. Exhibit A contains no markings other than the one detailing a juror's injury, which we discussed previously. We note that when an exception is not applicable to a whole document, it is the governmental body's responsibility to clearly indicate what provisions it contends are excepted from disclosure. Open Records Decision No. 150 (1977) at 2.

As to the CHRI, federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. 28 C.F.R. § 20.21(c)(1), (2). Section 411.097(c) of the Government Code also prohibits the district attorney from disclosing any CHRI obtained from the Department of Public Safety ("DPS") or any other criminal justice agency. *See also* Gov't Code § 411.087. Therefore, you must withhold from public disclosure CHRI contained in the records submitted for review.

You provided to this office for review an Employee's Withholding Allowance Certificate, Form W-4 of the Internal Revenue Service and an Employment Eligibility Verification Form, Form I-9 of the Immigration and Naturalization Service of the United States Justice Department. These documents were submitted as Exhibit B. You contend that this information is excepted from disclosure as information made confidential by law under section 552.101.

The information in a W-4 form is tax return information made confidential under title 26, section 6103(a) of the United States Code. Open Records Decision No. 600 (1992) at 8-9. The information in the Form I-9 may not be disclosed except as authorized under title 8, section 1324a of the United States Code, part of the Immigration Reform and Control Act. Section 1324a(b)(5) provides that information "contained in or appended to" a Form I-9 may be used only for certain enforcement purposes. *See id.* 1324a(d)(2)(D) (providing that employment verification system set up by Immigration Reform and Control Act must provide for protection of personal information disclosed pursuant to act's requirements); 8 C.F.R. section 274a.2(b)(4) (restricting use of Form I-9 information for certain enforcement purposes). You may therefore not release the documents in Exhibit B to the requestor.

You also submitted to this office medical records of the shooting victim, who is deceased. These records were marked Exhibit C. Access to these records is governed by the Medical Practice Act (the "MPA") article 4495b of Vernon's Texas Civil Statutes. Section 5.08(b) and (c) of the MPA provide:

> (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.
>
> (c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which the department obtained the records. Open Records Decision No. 565 (1989) at 7. Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Student records were submitted to this office as Exhibit D. You contend that these records are excepted from disclosure under section 552.114 of the Government Code. Section 552.114 requires that "information in a student record at an educational institution funded wholly or partly by state revenue" must be withheld from public disclosure, but may be released upon the request of the student or other authorized person. Section 552.026 of the Government Code provides as follows:

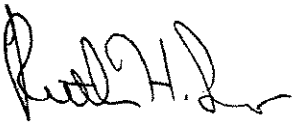
> This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974. . . .

The Family Educational Rights and Privacy Act ("FERPA") provides that federal funding shall not be available to "any educational agency or institution which has a policy or practice of permitting the release of education records of students" of students without the written consent of the parents of a minor student or of the student if he or she is eighteen years old or attending a postsecondary institution of education. 20 U.S.C. §§ 1232g(b)(1); 1232g(d). Since the county does not appear to be an educational agency or institution subject to FERPA or to section 552.114, this information may not be withheld from disclosure.

You contend that the records in Exhibit F may be withheld from disclosure under section 552.111. The only documents in Exhibit F which you may not withhold under section 552.103 are the documents that have already been disclosed to the defendant or the defendant's own statements or letter. Documents created by third parties or voluntarily disclosed to third parties are not "interagency or intraagency memorandum" under section 552.111. *See* Open Records Decision No. 474 (1987) at 5.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/rho

Ref.: ID# 28278

Enclosures: Marked documents

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